(9)

No. 89-645

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL MILKOVICH, SR.,
Petitioner,

vs.

THE LORAIN JOURNAL CO., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF OF THE OHIO NEWSPAPER ASSOCIATION, THE BEACON JOURNAL PUBLISHING COMPANY, THE CINCINNATI ENQUIRER, INC., THE DISPATCH PRINTING COMPANY, PLAIN DEALER PUBLISHING COMPANY, THOMSON NEWSPAPERS, INC., THE TOLEDO BLADE COMPANY AND THE VINDICATOR PRINTING COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS THE LORAIN JOURNAL CO., THE NEWS HERALD and J. THEODORE DIADIUN

LOUIS A. COLOMBO
Counsel of Record
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200
Attorney for Amici Curiae

Of Counsel:
DAVID L. MARBURGER
MICHAEL K. FARRELL
BAKER & HOSTETLER

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

28 pp

QUESTION PRESENTED

Whether this Court has jurisdiction to review an Ohio state court decision that applies a test developed by the Ohio Supreme Court for distinguishing statements of fact from statements of opinion in defamation cases, and that rests upon separate, adequate and independent grounds in the Constitution of the State of Ohio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

No. 89-645

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL MILKOVICH, SR.,
Petitioner,

vs.

THE LORAIN JOURNAL CO., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF OF THE OHIO NEWSPAPER ASSOCIATION, THE BEACON JOURNAL PUBLISHING COMPANY, THE CINCINNATI ENQUIRER, INC., THE DISPATCH PRINTING COMPANY, PLAIN DEALER PUBLISHING COMPANY, THOMSON NEWSPAPERS, INC., THE TOLEDO BLADE COMPANY AND THE VINDICATOR PRINTING COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS THE LORAIN JOURNAL CO., THE NEWS HERALD and J. THEODORE DIADIUN

INTEREST OF *AMICI CURIAE*

Amici submit this brief in support of respondents The Lorain Journal Co., The News Herald and J. Theodore Diadiun.[1] *Amici* urge the Court to dismiss the writ of certiorari as having been improvidently granted because the decision below was based upon separate, adequate and independent state grounds. *Amici* represent the entire spectrum of newspapers published in Ohio, from small weekly newspapers to the largest daily newspaper. Each day, the newspapers published by *Amici* reach millions of readers located in virtually every region of the State of Ohio.

THE OHIO NEWSPAPER ASSOCIATION is a statewide, nonprofit association of newspapers published in Ohio. Its membership includes eighty-seven daily newspapers and more than two hundred weekly newspapers.

THE BEACON JOURNAL PUBLISHING COMPANY publishes *The Beacon Journal*, a daily newspaper circulated in the Akron, Ohio area with daily circulation of more than 150,000 and Sunday circulation of more than 220,000.

THE CINCINNATI ENQUIRER, INC. publishes *The Cincinnati Enquirer*, a Cincinnati, Ohio newspaper with daily circulation of more than 305,000 and Sunday circulation of more than 335,000.

THE DISPATCH PRINTING COMPANY publishes *The Columbus Dispatch*, a Columbus, Ohio daily newspaper which reaches more than 255,000 readers daily and more than 375,000 readers each Sunday.

---

[1] Under Supreme Court Rule 37, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

PLAIN DEALER PUBLISHING COMPANY publishes *The Plain Dealer*, a daily newspaper in Cleveland, Ohio. *The Plain Dealer* has daily circulation of more than 445,000 and Sunday circulation of more than 565,000.

THOMSON NEWSPAPERS, INC. publishes *The Repository*, a daily newspaper in Canton, Ohio. *The Repository* reaches more than 55,000 readers each weekday and more than 75,000 readers each Sunday.

THE TOLEDO BLADE COMPANY publishes *The Blade*, a Toledo, Ohio daily newspaper which has daily circulation of more than 150,000 and Sunday circulation of more than 215,000.

THE VINDICATOR PRINTING COMPANY publishes *The Vindicator*, a daily newspaper circulated in Youngstown, Ohio. *The Vindicator* reaches more than 90,000 readers daily and more than 135,000 readers each Sunday.

Amici publish in each issue of their papers opinions and commentary by staff writers and members of the public, including editorials, letters to the editor, syndicated columns, guest columns, and staff columns and commentary. *Amici* therefore have a significant interest in the protection afforded published statements of opinion under the Ohio and federal Constitutions.

SUMMARY OF ARGUMENT

Because of the dual sovereignty that exists as a result of our federal system, and the case or controversy requirement of the United States Constitution, this Court has consistently held that it will not review state court decisions based upon separate, adequate and independent state law grounds, and that it will not issue advisory opinions. The Court therefore should not review this decision since it is based on separate, adequate and independent state law grounds; and, as a consequence, any decision by this Court would be advisory only.

The decision below reflects on its face that it is based on free speech rights contained in the Ohio Constitution. Furthermore, the *Scott* decision, which had previously been rendered by the Ohio Supreme Court, and which involved the same issue presented in this case arising out of the very same column at issue in this case, establishes beyond question that the Ohio courts' determination that the column at issue is a privileged expression of opinion is a decision grounded in Ohio law. Based upon a review of either the appellate decision in *Milkovich* or the Ohio Supreme Court decision in *Scott*, it is plain that there is nothing for this Court to review, and that the writ of certiorari was improvidently granted and should be dismissed.

ARGUMENT

THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE DECISION BELOW IS BASED UPON SEPARATE, ADEQUATE AND INDEPENDENT STATE LAW GROUNDS, AND THIS COURT THEREFORE LACKS JURISDICTION TO REVIEW THE DECISION

A. This Court Will Not Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds.

This Court has always recognized that it has no jurisdiction to review judgments of state courts which rest upon separate, adequate and independent state law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Murdock v. Memphis*, 87 U.S. 590, 636 (1875). It is especially important that the Court refrain from interfering with state court judgments that are based upon interpretations of state constitutions:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.

Michigan v. Long, 463 U.S. 1032, 1041 (1983) (*quoting Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).

Before this Court decides a state court case on the merits, it must determine whether separate, adequate and independent state grounds support the state court judgment. *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). When this Court grants a writ of certiorari to review a state court judgment, which the Court later determines is based upon separate, adequate and independent state grounds, the writ of certiorari will be dismissed as having been improvidently granted. *Colorado v. Nunez*, 465 U.S. 324 (1984); *Wilson v. Loew's Inc.*, 355 U.S. 597, 598 (1958). The basis for this rule is contained in the United States Constitution itself. The Constitution generally limits the jurisdiction of Article III courts to cases or controversies arising under the Constitution, laws and treaties of the United States. U.S. Const., article III, §2. Because of this limitation, federal courts cannot issue advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Muskrat v. United States*, 219 U.S. 346, 359-363 (1911). Since the Court has no jurisdiction to review state court decisions that rest on separate, adequate and independent state grounds, any decision the Court might issue in such a case would be advisory only and would violate the case or controversy limitation on federal jurisdiction.

B. Separate, Adequate And Independent State Law Grounds Exist Where A State Court Makes Clear In Its Opinion That It Is Basing Its Decision On State Law, Or Where Other Appropriate Inquiry Confirms That The Decision Is Based On State Law.

Prior to this Court's decision in *Michigan v. Long*, the methods used by the Court to determine if separate, adequate and independent state grounds supported a state court decision included (i) dismissing the case if the grounds for decision were unclear,[2] (ii) seeking a clarification of the grounds for decision from the state court itself,[3] and (iii) independently examining state law in general to determine if federal law served merely as a guide for the application of state law or provided the actual basis for the decision reached.[4] These varying

---

[2] *E.g., Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

[3] *E.G., California v. Krivda*, 409 U.S. 33 (1972); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

[4] *E.g., Texas v. Brown*, 460 U.S. 730 (1983).

approaches fostered an inconsistency that led the Court in *Michigan v. Long* to reexamine the method for determining if a state court judgment rests upon separate, adequate and independent state grounds. *Michigan v. Long* reformulated the test as follows:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. *If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.*

Michigan v. Long, 463 U.S. at 1040-1041 (1983) (emphasis added).[5]

While this test focuses on the face of the state court opinion, *Michigan v. Long* itself recognized that the existence of separate, adequate and independent state grounds is not always apparent from the face of an

[5] The standard announced in *Michigan v. Long* did not gain universal acceptance from the members of this Court. Justice Blackmun and Justice Stevens dissented separately because they objected to the test that was adopted. 463 U.S. at 1054 (Blackmun, J., dissenting) *and* 463 U.S. at 1065 (Stevens, J., dissenting). Justices Brennan and Marshall dissented on the merits. 463 U.S. at 1054.

opinion, and that it is sometimes appropriate to look beyond the face of a state court opinion in order to determine whether this Court has jurisdiction to decide the case:

> This approach obviates *in most instances* the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions.
>
> . . . .
>
> There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action.

Michigan v. Long, 463 U.S. at 1041, 1041 n.6 (emphasis added).

Michigan v. Chesternut[6] illustrates the type of situation in which an inquiry that goes beyond the face of a state court decision is appropriate. In that case, this Court examined the decisions cited by the Michigan court in the case presented for review in order to determine if the cited cases, and therefore the case presented for review, rested upon separate, adequate and independent state grounds. Since the Court found that the cited decisions were not based on separate, adequate and independent state grounds, the Court held that the case presented for review also was not based on separate, adequate and independent state grounds. *Michigan v. Chesternut*, 486 U.S. at 571 n.3.

[6] 486 U.S. 567 (1988).

C. The Decision Below Was Based On Separate, Adequate And Independent State Law Grounds, And Is Not Reviewable By This Court.

1. On its face, the decision of the Ohio court of appeals reflects that it is based on separate, adequate and independent state law grounds.

A review of the history of this case and the companion case of *Scott v. News-Herald*[7] is essential to an understanding of the basis for the decision below.[8] On January 8, 1975, respondents Lorain Journal Co. and Diadiun published the newspaper column at issue here. That column criticized the conduct of Maple Heights wrestling coach Milkovich and Maple Heights School Superintendent Scott in connection with a disturbance at a high school wrestling match and the ensuing administrative inquiry and litigation. Milkovich and Scott filed separate libel actions based upon that column.

The *Milkovich* case followed a tortuous path to this Court, including two prior petitions for certiorari that were denied. The *Scott* case was moving more slowly through the judicial process at the same time. What is relevant here is that the Ohio Supreme Court decided in 1986 in the *Scott* case that Diadiun's column constituted an expression of opinion, and that it could not be the basis for a defamation claim. Based on that determination, the lower courts then ruled the same way in the *Milkovich* case, which was awaiting re-trial, holding that if the column was opinion in the one case then, *ipso facto*, it was opinion in the other case.

---

[7] 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

[8] The full, relevant procedural history of both cases is set out in the Brief of Respondents and is not repeated here in the interest of brevity.

The court of common pleas in *Milkovich* entered summary judgment in favor of respondents without written opinion. (Joint Appendix [hereinafter, "J.A."] 107.) In affirming the award of summary judgment, the court of appeals noted that respondents' renewed motion for summary judgment was based solely on the *Scott* decision: "The attached memorandum basically stated that the case of *Scott v. News-Herald*, *supra*, was now the law and should control in the instant cause. Nothing else was attached to the motion." (J.A. 112.)

The *Milkovich* court of appeals' opinion contains clearly expressed state grounds which preclude review by this Court. The court of appeals expressly stated the basis for its holding as follows:

> In the instant cause, it has been decided, as a matter of law, that the article in question is protected opinion.
>
> "*** In *Milkovich v. News-Herald*, *supra*, this court recently dealt with the same article we examine today.
> *** [W]e now overrule the holding in *Milkovich* with respect to the characterization of the article. We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press." (Quoting *Scott v. News-Herald.)*

(J.A. 114.)

Although the court of appeals' opinion also refers to federal cases, the basis for the decision was plainly stated as Section 11, Article I of the Ohio Constitution as interpreted by the Ohio Supreme Court in *Scott*. The federal cases mentioned in the opinion serve only as

analogous support for the result reached under *Scott* and the Ohio Constitution and do not control the appellate court's decision.[9]

The remainder of the court of appeals' opinion deals with issues not relevant here. Insofar as the issue presented for review, the Ohio court's position is expressed simply and bluntly in the foregoing holding. That holding reflects that there is nothing for this Court to review.

2. On its face, the decision of the Ohio Supreme Court in *Scott*, the sole basis for the decision of the court of appeals in this case, reflects that it is based on separate, adequate and independent state law grounds.

This case may be unique in the annals of libel jurisprudence in that it is the second case decided by a high Ohio court involving the very same comments made in the very same allegedly defamatory column. Because the Ohio Supreme Court had done a detailed analysis of the question of whether respondent Diadiun's column was fact or opinion in its *Scott* decision, the court of appeals in *Milkovich* was able to dispose of this issue very simply. Thus, the court of appeals did not engage in any independent analysis of the applicable law; it simply adopted as controlling the Ohio Supreme Court's ruling on the same facts and issues in *Scott*.[10]

[9] The court of appeals in *Milkovich* was bound to follow the decisions of the Ohio Supreme Court, the ultimate arbiter of Ohio law. *Krause v. State*, 31 Ohio St. 2d 132, 148, 285 N.E.2d 736, 746 (1972) (decisions of the court of last resort are to be regarded as law and should be followed by inferior courts until reversed or overruled) (Corrigan, J., concurring).

[10] Petitioner has twice acknowledged that the court of appeals viewed *Scott* as controlling its decision: "The Eleventh District Court of Appeals below considered itself bound by the *Scott* decision under Ohio procedural rules recognizing intervening decisions of the Supreme Court of Ohio as an exception to the law of the case doctrine." Brief Of Petitioner at 34 n.26. *See also* Petition for Writ of Certiorari at 33 ("The decision *sub judice* is entirely premised on the decision in *H. Don Scott v. The News-Herald*. . .").

If this Court does not find that the decision of the court of appeals in *Milkovich* plainly states that it is based on separate, adequate and independent state grounds, then this case is certainly one of those cases in which it is "necessary or desirable" to go beyond the face of the decision below to determine whether separate, adequate and independent state grounds exist to support it.[11] Since *Milkovich* indisputably reveals on its face that it is based solely on the Ohio Supreme Court's conclusion in *Scott* that the statements at issue are protected under Section 11, Article I of the Ohio Constitution, an examination of whether or not the *Scott* decision was based on separate, adequate and independent state grounds will answer the question of whether the *Milkovich* decision was. For the Court to do this analysis, no detailed inquiry into prior decisions is needed. No remand is required. All the Court need do is apply its *Michigan v. Long* test to the face of the *Scott* decision.

a. *The State Law Grounds Upon Which Scott v. News-Herald Is Based Are Clearly Expressed.*

The *Scott* decision *begins* by expressly stating that it rests upon separate, adequate and independent state law grounds. In the very first paragraph of Section I of the opinion, the Ohio Supreme Court writes:

> We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.

Scott, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

[11] *See Michigan v. Chesternut*, 486 U.S. at 571 n.3; *Michigan v. Long*, 463 U.S. at 1041, 1041 n.6.

There is no reference to the First Amendment, to any decision of this Court, or to anything else. The decision is grounded in the Ohio Constitution; the reference to the state constitution is not a mere "tag-along" or "throw-in" to a First Amendment analysis.

The balance of Section I of *Scott* discusses the protection traditionally afforded expressions of opinion under federal and state cases. Following this historical discussion, the Ohio Supreme Court makes plain that these rights of free speech and free press are independently grounded in Ohio law:

> These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are *independently reinforced* in Section 11, Article I of the Ohio Constitution which reads in pertinent part:
>
> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

Scott, 25 Ohio St. 3d at 245, 496 N.E.2d at 702 (emphasis added). Especially in the context of the Ohio Supreme Court's express invocation of the Ohio Constitution and no other authority in setting forth its holding, these statements indicate "clearly and expressly" that the Ohio Supreme Court's decision was based on separate, adequate and independent state law grounds—the Ohio court's interpretation of the Ohio Constitution.[12]

[12] This Court is bound by the Ohio Supreme Court's interpretation of the Ohio Constitution. *Thornton v. Duffy*, 254 U.S. 361, 368 (1920) (the construction placed on the constitution and laws of a state by its highest court must be accepted by the Supreme Court).

b. The State Law Grounds Upon Which Scott v. News-Herald Is Based Are Separate, Adequate And Independent Of Federal Law.

Section V of the *Scott* opinion contains the decision that petitioner wants this Court to review—the Ohio Supreme Court's decision that the statements in respondent Diadiun's column are protected statements of opinion.[13] That decision is not reviewable because that decision rests solely on state law.

In addition to the Ohio Supreme Court's express statement that it was basing its decision on the Ohio Constitution, a review of the analysis that the Ohio Supreme Court undertook in reaching its ultimate conclusion in *Scott* makes clear that the court understood that it had the option to choose from among several alternative tests for distinguishing fact from opinion; that it was not required by federal law to choose any particular test; and that it was selecting the test for Ohio based upon the court's right as the ultimate interpreter of Ohio law to select the test it deemed appropriate.

The Ohio Supreme Court began its analysis of the appropriate test by recognizing that its earlier decision in *Milkovich* had offered no analysis in reaching the conclusion that the statements in Diadiun's column were statements of fact and not opinion. *Scott*, 25 Ohio St. 3d at 249, 496 N.E.2d at 705.[14] The court then noted that statements of opinion are "generally accorded absolute

[13] Sections II, III and IV of the *Scott* opinion discuss Scott's public official status, the actual malice standard, and the proof of actual malice offered by Scott, respectively. This Brief will not address those issues.

[14] *See Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 298-299, 473 N.E.2d 1191, 1196-1197 (1984).

immunity" and that the issue of whether a statement is fact or opinion is a legal issue to be decided by the court.[15] *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 705. The manner in which the Ohio Supreme Court cited and discussed the federal cases in this portion of the opinion demonstrates that it viewed them as analogous, but not controlling, authority. The court cited cases from this Court, from other state courts, and from lower federal courts, all in the same fashion, and all as background for its decision.

The Ohio court recognized that its selection of a test for differentiating between fact and opinion was not compelled by federal law; instead, the court recognized that it had the right to choose an Ohio standard from several available alternatives.

> In establishing an analytical framework to separate fact from opinion, a number of possibilities are open to us.

Scott, 25 Ohio St. 3d at 250, 496 N.E.2d at 705-706. The potential tests the Ohio Supreme Court identified as those it could adopt included the three-part test promulgated by the Ninth Circuit in *Information Control Corp. v. Genesis One Computer Corp.* and applied in *Murray v. Bailey*;[16] the test set out in the Second

[15] While the *Scott* opinion interprets both federal and Ohio law as prohibiting defamation claims based on expressions of opinion, *Scott* makes clear that the Ohio Supreme Court did not view federal law as requiring any particular test for *differentiating* fact from opinion, the issue presented by petitioner for review by this Court.

[16] The Ninth Circuit's test examines whether a statement: (1) conveys pertinent information to the public about a matter of public interest; (2) is made in the course of public debate or similar circumstances; and (3) is phrased in cautionary language. *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-784 (9th Cir. 1980); *Murray v. Bailey*, 613 F. Supp. 1276, 1282 (N.D. Cal. 1985).

Restatement of Torts;[17] and the "subjective" test which the Ohio Supreme Court stated it had earlier applied in this case. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. The court specifically considered the merits of each of these tests, then opted for a "totality of the circumstances" test based generally upon the analysis in *Ollman v. Evans*.[18]

The Ohio Supreme Court's statements and the manner in which it considered several potential tests, some federal and some state, and then adopted its own standard demonstrates that it did not view its decision in *Scott* as compelled by federal law. Rather, because the court was applying Ohio law, it felt free to adopt the standard it felt best served the requirements of the Ohio Constitution. In doing so, the court was acting as the ultimate arbiter of Ohio law. This Court should not interfere with that determination.

[17] Under the Restatement, a statement in the form of an opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. Restatement (Second) Of Torts §566 (1977).

[18] *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. The court in *Ollman* stated that "courts should analyze the totality of the circumstances" in deciding whether a statement is an opinion protected by the First Amendment. The court listed four factors to be considered by a court in evaluating the totality of the circumstances: (1) the common usage or meaning of the specific language of the challenged statement; (2) the statement's verifiability; (3) the full context of the statement—the entire article or column for example; and (4) the broader context or setting in which the statement appears. *Ollman v. Evans*, 750 F.2d 970, 979-984 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also Janklow v. Newsweek*, 759 F.2d 644, 649 (8th Cir. 1985), *cert. denied*, 479 U.S. 883 (1986).

D. Consistent With This Court's Invitation To The States In *Gertz* To Develop Their Own State Defamation Law, The Ohio Supreme Court On Several Occasions Has Properly Invoked The Separate And Independent Rights Established By The Ohio Constitution As The Basis For Its Decisions.

About fifteen years ago, this Court invited the states to develop their own standards in certain areas of First Amendment jurisprudence that generally had been viewed to be the sole province of federal law following this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Among other things, this Court recognized the propriety of state courts granting expanded protection to speech beyond that mandated by the First Amendment. Thus, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the Court held that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

Consistent with this directive, various states have seen fit to grant differing degrees of protection to such publishers under state law. *See* R. Sack, *Libel, Slander and Related Problems*, 250-260 (1980); B. Sanford, *Libel and Privacy*, 300-305 (1985). The Ohio Supreme Court, specifically, has made a conscious effort to develop Ohio libel law in those areas left open to it by this Court. For instance, the Ohio Supreme Court initially chose a negligence standard to apply to defamation cases involving private persons. *Embers Supper Club v. Scripps Howard Broadcasting Co.*, 9 Ohio St. 3d 22, 24-25, 457 N.E.2d 1164, 1167 (1984), *cert. denied*, 467 U.S. 1226 (1984).

Later, in *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St. 3d 176, 512 N.E.2d 979 (1987), the Ohio Supreme Court adopted a clear and convincing evidence standard for proof of fault in private-figure defamation actions, as well as a standard of appellate review for private-figure cases.[19] The decision reflects a conscious choice of a standard under Ohio and not federal law:

> [I]n cases such as the one at bar, when actual malice need not be proven, we decline to embrace the [federal] independent review requirement. "***The negligence standard for compensatory damages that we have adopted is not a matter of governing federal constitutional law; rather, within the parameters authorized by *Gertz*, we have fixed the standard as a matter of state law. Accordingly, *Bose*, as well as the federal decisions on which it is based, is not controlling on this issue."

Lansdowne, 32 Ohio St. 3d at 181, 512 N.E.2d at 985 (*quoting Gazette, Inc. v. Harris*, 229 Va. 1, 20, 325 S.E.2d 713, 728 (1985), *cert. denied*, 472 U.S. 1032 (1985)).

The Ohio Supreme Court has recognized the existence of independent free speech rights arising from the Ohio Constitution in other contexts too. In a case holding that closure orders excluding the press from a trial were insufficient to satisfy Section 16, Article I of the Ohio Constitution and the First Amendment, Chief

---

[19] *Lansdowne* also reiterated the Ohio Supreme Court's holding in *Scott* that the Ohio Constitution provides protection separate and independent from the federal Constitution:

> In *Scott*, we also recognized that First Amendment freedoms under the federal Constitution are independently reinforced in Section 11, Article I of the Ohio Constitution. . . .

32 Ohio St. 3d at 178, 512 N.E.2d at 982.

Justice Celebrezze of the Ohio Supreme Court expressly addressed the separate guarantees of the Ohio Constitution:

> Although federal law is consonant with our holding, "*** it is well to remember that Ohio is a sovereign state and that the fundamental guarantees of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties." *Direct Plumbing Supply Co. v. Dayton* (1941) 138 Ohio St. 540, 545 . . . .

State ex rel. The Repository v. Unger, 28 Ohio St. 3d 418, 422, 504 N.E.2d 37, 41 (1986) (Celebrezze, *C. J.*, concurring).

On the other hand, the Ohio Supreme Court's references to the Ohio Constitution in free speech cases have not been routine or pro forma. Where federal law is well settled, as in *New York Times Co. v. Sullivan*-type cases, the Ohio Supreme Court has made it a practice to base its decisions on a straightforward First Amendment analysis. *E.g.*, *Perez v. Scripps Howard Broadcasting Co.*, 35 Ohio St. 3d 215, 520 N.E.2d 198 (1988), *cert. denied*, 109 S. Ct. 179 (1988); *Varanese v. Gall*, 35 Ohio St. 3d 78, 518 N.E.2d 1177 (1988), *cert. denied*, 487 U.S. 1206 (1988); *Grau v. Kleinschmidt*, 31 Ohio St. 3d 84, 509 N.E.2d 399 (1987); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962 (1981). The willingness of the Ohio Supreme Court to differentiate in its own free speech decisions between those that are grounded solely in federal law and those that are based alternatively or separately on state law underscores the significance attached by the

Ohio Supreme Court to the Ohio Constitution as a source of free speech rights separate and independent from the federal Constitution. That distinction also underscores the absence of valid federal grounds for this Court's review of the decision below, which was grounded specifically in state law. The Ohio Supreme Court has made conscious, informed distinctions in its opinions. Those distinctions are entitled to appropriate deference from this Court.[20]

---

[20] To reverse a decision like this one, when it is plain that the Ohio court would reissue its same ruling on remand, undercuts public confidence in the judicial process and causes unnecessary friction between state courts and this Court. *See Ponte v. Real*, 471 U.S. 491, 503 (1985) (Stevens, *J.*, dissenting).

CONCLUSION

The Ohio Supreme Court's decision in *Scott* is grounded in separate, adequate and independent state law. It is the result of a conscious decision of the Ohio court, as appears from the court's consistent willingness to distinguish free speech decisions grounded solely in federal law from those grounded independently in state law. The decision of the Ohio Supreme Court is consistent with this Court's invitation to the states in *Gertz* to develop their own standards in certain areas of libel law. The appellate decision in *Milkovich* makes clear on its face that it was based solely on *Scott* and the Ohio Constitution. For the foregoing reasons, *Amici* respectfully urge that the writ of certiorari be dismissed as having been improvidently granted.

Dated: April 7, 1990

Respectfully submitted,

LOUIS A. COLOMBO
Counsel of Record
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200
Attorney for Amici Curiae

Of Counsel:
DAVID L. MARBURGER
MICHAEL K. FARRELL
BAKER & HOSTETLER